

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 096 of 2016

BETWEEN : STATE

AND : RAKESH CHAND

Counsel : Ms Naibe for the State
Mr Tunidau for the Accused

Dates of Hearing : 13 and 14 May 2019

Closing Speeches : 14 May 2019

Date of Summing up: 15 May 2019

Date of Judgement : 21 May 2019

JUDGMENT

1. The Accused is charged with one count of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009.

2. The Accused pleaded not guilty to the offence of rape. The prosecution called three witnesses at the trial. After the closure of the prosecution case the Accused gave evidence. No other witnesses were called for the defence.
3. After the first day of hearing one of the assessors did not appear in court. The court decided to proceed with the two remaining assessors pursuant to section 225 of the Criminal Procedure Act.
4. The assessors were given directions on how to assess evidence after the closing speeches of both parties. After summing up the case to the assessors, they unanimously found the Accused not guilty to the count of rape.
5. Having directed myself in accordance with the summing up I will now review the evidence adduced in this case to pronounce my judgement.
6. The prosecution case was that the complainant was allegedly raped by the Accused at his place on 03 May 2018. The Accused totally denied the allegation.
7. According to the evidence of the complainant, she has come to Lautoka to see the second prosecution witness, Ashneel Ashish Chand who was her de facto husband at that time. The complainant said that she had been separated from him. However, the second witness, Ashneel denied that they were separated at that time. The complainant's evidence was that she came to Lautoka by the 9.30 am bus from Rakiraki. After arriving in Lautoka she had gone on shopping with Ashneel and the Accused. Later they had gone to the Accused's house.
8. The complainant said that she came to Lautoka to give an application for maintenance and custody to Ashneel. However, Ashneel said that he was not aware of such a case. He said that it was him who requested her to come to Lautoka. The complainant however said that she did not give the documents to him. When the complainant was asked as to why those papers were not given to him, she said that she has no answer.

9. When Ashneel had gone to look for a rental vehicle around 6 pm the complainant said that she was at the Accused's place with the Accused and his father in law. Although the Accused's father in law was present inside the house at the time of the alleged offence the complainant had not even called him for help. The complainant's explanation for not calling for help was that the Accused's hand was on top of her mouth. According to the complainant, during the entire process of pulling her pants down, licking her vagina and even during the alleged sexual intercourse the Accused's hand had been on the top of her mouth.

10. The complainant said that once the Accused stopped what he was doing to go and check a noise of an approaching vehicle. She did not explain as to why she could not call for help from the other person who was in another room of the same house during that time. The complainant never said that the Accused threatened her. She further said that during the whole time her hands were behind her back. It was not very clear how were the hands placed like that during the entire alleged incident. The prosecution failed to elaborate on how the complainant was restrained. However, the complainant did not say that the Accused was holding her hands or there was any other difficulty for her not to use her hands to resist. The complainant gave evidence as follows during examination in chief;

Q: When Rakesh did this why didn't you shout or why didn't you use your hand to push him away, why didn't you do it ?

A: Because my hands were at the back and his one hand was on the top of my mouth.

11. When Ashneel had come home, the Accused had gone to the sitting room. The complainant had been still in the bed room where the alleged offence took place. She said that she heard Ashneel's voice. But she had not called him even then. When Ashneel came to the room she said that she was still naked. She had started crying when Ashneel found her in the room without clothes. She said that even the Accused's son came to the room to take his phone and she

was not wearing anything at that time. She also said that when she was with Ashneel the Accused tapped on her hand and told Ashneel that nothing had happened to her. According to her she was still not wearing any clothes.

12. During the cross examination the complainant admitted that she had had sexual intercourse with Ashneel on the same day prior to the alleged incident. She said that she did not tell that to court as it was not asked from her. She said that she had sexual intercourse with Ashneel around 10-11 am. However, she previously said that she came from Rakiraki by 9.30 am bus. When Ashneel was cross examined, he said that they did not have sexual intercourse in the morning and it was midday.
13. The defence successfully created a doubt that the injury on the complainant's labia majora may have caused as a result of the sexual intercourse between the complainant and Ashneel. The prosecution could not clear this doubt by adducing clear evidence to exclude the possibility.
14. When she was asked as to why she did not go back on the same day to Rakiraki she said that Ashneel forced her to stay. However, she later said that Ashneel did not force her and he only requested her to stay. She also said that it was Ashneel who related the incident to the doctor when she was taken for medical examination. However, Ashneel as well as the doctor contradicted her evidence by saying that it was the complainant who related the incident.
15. The prosecution evidence was unsatisfactory in many respects. The complainant's evidence was full of inconsistencies and contradictions. Her evidence was improbable and lacked consistency. She gave evidence in a very unconvincing manner. I am not satisfied that her evidence is credible.
16. The assessors were given directions on how to assess credibility and evaluate probability of events. They were directed on how to treat inconsistencies in

evidence. It appears that the assessors have declined to believe the evidence of the complainant.

17. In my view the assessors' opinions are not perverse. I concur with their unanimous opinion. It is my considered opinion that it is not safe to act on unreliable evidence given by the complainant.

18. I decide that the prosecution failed to prove the offence against the Accused beyond reasonable doubt.

19. The Accused is acquitted accordingly.



Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Mr Tunidau